Supreme Court, U.S.
FILED
MAR 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1085

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HERBERT PAGEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

(To the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, No. CR A 23539)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN,
City Attorney of Los Angeles
WILLIAM N. STERLING,
Deputy City Attorney
LAURENCE WAYNE MOONEY,
Deputy City Attorney
(Counsel of Record)
1600 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-5483

Attorneys for Respondent
State of California

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

QUESTION PRESENTED

Did the state trial court violate petitioner's Sixth Amendment right to an impartial jury trial or deny him due process or equal protection of the laws as guaranteed by the Fourteenth Amendment by preventing him from excusing prospective jurors solely on the basis of their race?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT	3
A. The Constitutional Issues Raised in the Petition for Certiorari Were Neither Raised Nor Addressed in the State Courts	3
B. Petitioner Posed No Constitutional Objection to the Makeup of the Jury Which Heard the Evidence and Rendered the Verdict	5
C. The Appellate Department's Holding Restricting Petitioner's Peremptory Challenges Is Consistent with Federal and State Authority on that Developing Issue	7
D. The State Trial Court Restriction Upon the Exercise of Petitioner's Peremptory Challenges Was Not Violative of the Sixth or Fourteenth Amendments	9
1. States Need Not Allow Defense Peremptory Challenges. Once a Sate Permits Such Challenges, It May Restrict Them in any Reasonable Manner	10
2. Petitioner Had No Constitutional Right to a Petit Jury Panel from which Blacks Were Excluded Solely on the Basis of Race	17

Page

3. The State of California Was Entitled to a Fair Trial before Impartial Jurors 19

4. All Citizens, Regardless of Race, Must Be Allowed to Participate in Jury Deliberations in Criminal Cases 21

CONCLUSION 23

TABLE OF AUTHORITIES

United States Supreme Court

Page

Apodaca v. Oregon, 406 U.S. 404, 32 L.Ed.2d 152, 92 S.Ct. 1628 (1972) 13, 14, 18

Ballard v. United States, 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261 (1946) 22

Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) 4, 5, 7, 8, 12, 17, 18, 19, 21

Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962) 4

Brown v. North Carolina, 479 U.S. ___, 93 L.Ed.2d 373, 107 S.Ct. 423 (1986) 22

Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969) 4

Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963) 13

Frazier v. United States, 335 U.S. 497, 93 L.Ed. 187, 69 S.Ct. 201 (1948) 6

Glasser v. United States, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942) 21

Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 S.Ct. 350 (1887) 6, 19

Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972) 7, 13, 14

Marshall v. United States, 414 U.S. 417, 38 L.Ed.2d 618, 94 S.Ct. 700 (1974) 13

McCray v. New York, 461 U.S. 961, 77 L.Ed.2d 1322, 103 S.Ct. 2438 (1983) 7

Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972) 22

Table of Authorities Cited

United States Supreme Court

	Page
Pointer v. United States, 151 U.S. 396, 38 L.Ed. 208, 14 S.Ct. 410 (1894)	6
Ross v. Moffitt, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974)	13
Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948)	23
Singer v. United States, 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783 (1965)	19, 20
Stilson v. United States, 250 U.S. 583, 63 L.Ed. 1154, 40 S.Ct. 28 (1919)	10
Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880)	21
Stroud v. United States, 251 U.S. 15, 64 L.Ed. 103, 40 S.Ct. 50 (1919)	6
Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965)	10, 22
Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975)	22
Thiel v. Southern Pacific Co., 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984 (1946)	22
United States v. Marchant, 25 U.S. 480, 6 L.Ed. 700 (1827)	10
United States v. Wood, 299 U.S. 123, 81 L.Ed. 78, 57 S.Ct. 177 (1936)	10
Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 106 S.Ct. 617 (1986)	22
Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970)	11, 17, 18

TABLE OF AUTHORITIES CITED

United States Court of Appeals

Page

Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) 8, 20

State Courts

Commonwealth v. DiMatteo, 12 Mass.App. 547, 427 N.E.2d 754 (1981) 8

Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495 (1981) 8

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979) 8, 9

People v. Pagel, 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 (1986) 4, 17

People v. Thompson, 79 App.Div.2d 87, 435 N.Y.S.2d 739 (1981) 8

People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) 2, 3, 5, 8, 15, 16, 17, 18

Riley v. State, 496 A.2d 997 (Del.Supr. 1985) 8

State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) 8

State v. Neil, 457 So.2d 481 (Fla. 1984) 8

Constitutional Provisions

Sixth Amendment 4, 9, 11, 12

Fourteenth Amendment 1, 4, 9, 12, 23

California Constitution, Art. 1, section 16 16

TABLE OF AUTHORITIES CITED

Page

Statutes

Page

California Penal Code
§ 1069 15
§ 1070 15

Court Rules

Rule 17.1(b), United States Supreme Court Rules 9

No. 86-1085

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HERBERT PAGEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

(To the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, No. CR A 23539)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those provisions cited by petitioner (Petition 4), the following federal constitutional provision is involved in this proceeding:

The Fourteenth Amendment to the United States Constitution, to the extent that it provides:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Facts and proceedings additional to those recited in the Petition are necessary for consideration of the issues raised by petitioner.

Petitioner states that the trial court "invited" the deputy city attorney to make a motion to dismiss the jury panel. (Petition 6.) Immediately after defense counsel Larry Mullins excused prospective juror Mitchell, Deputy City Attorney Tso asked to approach the bench. Only then did the court mention *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), and concur in the prosecutor's expressed concern over a possible misuse of peremptory challenges under that case. (RT 12/11-12/12/84, at p. 111:5-27.)

In the discussion between court and counsel which followed, Mr. Mullins made no assertion that the case of *People v. Wheeler* did not apply to restrict peremptory challenges by criminal defendants. Rather, he simply proffered justifications for challenging the three jurors, even though the trial judge stated specifically that "[b]oth sides must comply with the mandate of *People v. Wheeler.*" (RT 12/11-12/12/84, at pp. 112-114.) When Ms. Tso renewed her objection to petitioner's excusal of the potential jurors the next morning, Mr. Mullins explained his reasons for dismissing the three, but again did not contend that the application of *Wheeler* to his challenges violated any federal constitutional provisions. (RT 12/11-12/12/84, at pp. 143, 146-150.)

The trial judge, prior to making his order dismissing the jurors and quashing the venire, specifically stated the legal and factual grounds for his determination that petitioner's counsel had excused jurors based on improper grounds. The court stated that

> "Once the People have shown a prima facie case of noncompliance with the dictates of *Wheeler*[,] . . . the burden shifts to the defense, [and] the defense must present satisfactory evidence to this Court that the peremptories were exercised for specific bias. That has not been the case here.

> "With regard to the motion before the Court, the Court finds that the burden of justification that has shifted to the defense has not been sustained as to all of the questioned challenges, particularly as applied to one of the jurors, Mr. Street.
>
> "Therefore, the validity of the presumptions has been effectively and satisfactorily rebutted."

The court relied for its ruling on *People v. Wheeler* and a series of rulings by California Courts of Appeal. (RT 12/11-12/12/84, at pp. 153-154.)

On the day following the dismissal of the selected jurors and the quashing of the remaining venire, the cause was transferred to another division of the Los Angeles Municipal Court for trial. (Docket entry for 12/13/84.) During the next two court days, the parties selected jurors from a new venire of prospective jurors. Petitioner was still represented by Mr. Mullins. On December 17, petitioner accepted twelve jurors and one alternate. No objection appears on the record that petitioner's right to exercise peremptory challenges had been abridged either by the quashing of the first jury venire or by the second jury selection process. (Docket entries for 12/14 and 12/17/84.) Ultimately, the previously accepted alternate sat as a juror. The jury, after a three-day trial, found petitioner guilty as charged. (Docket entry of 12/19/84.)

ARGUMENT

A. The Constitutional Issues Raised in the Petition for Certiorari Were Neither Presented Nor Addressed in the State Courts

Petitioner states that the question presented to this Honorable Court by his petition is whether defense counsel's use of peremptory challenges may be restricted to the same extent as the prosecution's challenges were

limited in *Batson v. Kentucky,* 476 U.S. ____, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). (Petition 2.) Respondent has posed the question differently. Regardless of the form in which the federal issue is presented, however, the fact remains that petitioner never specifically made the claim in the state court, and the Appellate Department of the Los Angeles Superior Court did not address any federal question in its Opinion. Therefore, the jurisdiction of this Court has been improperly invoked, and certiorari should be denied.

In *Cardinale v. Louisiana,* 394 U.S. 437, 438, 22 L.Ed.2d 398, 400, 89 S.Ct. 1161 (1969), this Court determined that federal issues not raised and decided in the state courts could not be addressed by the United States Supreme Court. (See also, *Beck v. Washington,* 369 U.S. 541, 550, 8 L.Ed.2d 98, 107-109, 82 S.Ct. 955 (1962).) The Statement of the Case petitioner supplies this Court and the additional facts in respondent's own statement, *supra,* reveal that at no time did petitioner's trial counsel object to the trial court placing constraints upon his peremptory challenges. He neither cited to the federal constitutional guarantees of an impartial jury trial, nor to due process or equal protection of the laws. Moreover, he did not enter an objection to the proceedings upon the ground that petitioner now takes: that the defense, because of its "time-honored right to unfettered peremptory challenges" (Petition 16), should not be subject to the same constraints as the prosecution with respect to challenges based upon race.

Furthermore, nothing in the Appellate Department's Opinion (Petition Appendix A, *People v. Pagel,* 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 (1986)) makes reference to any claim by petitioner before that court that the Sixth and Fourteenth Amendments precluded the state trial court from dismissing the jury panel in this

case. In fact, only passing reference appears to even *Batson v. Kentucky, supra.*[1] Nowhere in the Opinion, however, does the state appellate court decide a federal question based on *Batson.* Rather, the Opinion determines that as a matter of state law the prosecution may be allowed to question a defendant's removal of black jurors without reason. This is true, even though the Appellate Department's Opinion was filed September 25, 1986, almost five months after *Batson v. Kentucky* was decided by this Court on April 30, 1986. On this record, this Honorable Court is without jurisdiction to grant the Petition.

B. Petitioner Posed No Constitutional Objection to the Makeup of the Jury Which Heard the Evidence and Rendered the Verdict

Petitioner does not assert that he was restricted from exercising any peremptory challenges during the jury selection process of December 14 and 17, 1984, which immediately preceded his trial. Nowhere in that procedure does he claim there was a denial of his statutory right to excuse a juror without cause. In fact, in this second jury selection process petitioner accepted the regular and alternate jurors for his trial after a lengthy voir dire. That jury found appellant guilty, and it is the judgment following that conviction that petitioner appealed. Petitioner may not apply to this Court for relief from asserted errors in the initial jury selection proce-

---

[1] *Batson* was cited in footnote 1 of the Opinion (Petition A-6 to A-7, 186 Cal.App.3d at Supp. 6, 232 Cal.Rptr. at 107) to suggest that this Court, if it were to decide whether the defense was subject to the restrictions announced in that case and in *People v. Wheeler, supra,* would consider wide-ranging public policy issues such as the community effect of racially-based exclusion of jurors. This generalized reference to the *Batson* case clearly does not constitute a decision on the federal questions petitioner now presents.

dure. This is true because petitioner was tried in an error-free trial by a jury to which he raised no objection.

In *Hayes v. Missouri,* 120 U.S. 68, 30 L.Ed. 578, 4 S.Ct. 350 (1887), the plaintiff in error had been convicted of murder in a state court in the city of St. Louis. He asserted error in this Court, claiming that his right to equal protection had been denied by a Missouri law which at that time allowed the prosecutor fifteen peremptory challenges in cities exceeding 100,000 inhabitants, but only eight such challenges elsewhere in the state. In Hayes' trial, the state had used all 15 challenges permitted to it. This Court affirmed. In so doing, it stated:

> "In this country the power of the Legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury.... The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more.... In this case, it is not even suggested that the jury by which the accused was tried was not a competent and impartial one." (*Id.,* 120 U.S. at 71, 30 L.Ed. at 580, 7 S.Ct. 350.)

(See also *Frazier v. United States,* 335 U.S. 497, 504, 508, 93 L.Ed. 187, 194-196, 69 S.Ct. 201 (1948); *Stroud v. United States,* 251 U.S. 15, 20-21, 64 L.Ed. 103, 111, 40 S.Ct. 50 (1919); *Pointer v. United States,* 151 U.S. 396, 412, 38 L.Ed. 208, 215, 14 S.Ct. 410 (1894).)

On the basis of the authority above and since no proper objection was made to the constitution of the jury panel that actually tried him, petitioner cannot now complain of any error of the trial court during the original jury selection process which that court terminated by a quashal of the petit jury venire.

C. The Appellate Department's Holding Restricting Petitioner's Peremptory Challenges Is Consistent with Federal and State Authority on that Developing Issue

In his opinion respecting the denial of the petitions for writs of certiorari in *McCray v. New York,* 461 U.S. 961, 77 L.Ed.2d 1322, 103 S.Ct. 2438 (1983), Justice Stevens, joined by Justices Powell and Blackmun, stated that the issue of whether the Constitution prohibits a prosecutor's use of peremptory challenges to exclude from a jury members of a particular group was not ready to be addressed by this Court. Justice Stevens pointed to the absence of the conflict of decision within the federal system and the developing litigation on the issue in the state courts. He concluded:

> "In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." (*Id.,* 461 U.S. 961, 77 L.Ed.2d at 1323, 103 S.Ct. 2438.)

The issue was, of course, finally addressed in *Batson v. Kentucky* after the Kentucky Supreme Court curtly disposed of the authority developing against a prosecutor's use of race-based peremptory challenges "in a single paragraph." (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 79, 106 S.Ct. 1712.)

Respondent submits that the issue of the appropriate restriction of a criminal defendant's peremptory challenges presented in this case stands as the *"Batson"* issue did in 1983, *i.e.,* further treatment of the issue in the nation's lower courts is warranted. (See also *Johnson v. Louisiana,* 406 U.S. 356, 376, 32 L.Ed.2d 152, 167-168, 92 S.Ct. 1620 (1972) (Powell, J., concurring).) In the first place, as Chief Justice Burger noted in his dissent in

Batson v. Kentucky, which was joined by Justice Rehnquist:

> " 'Every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.' [Citation.]" (*Batson v. Kentucky, supra,* 476 U.S. at ____, fn. 6, 90 L.Ed.2d at 107, 106 S.Ct. 1712.)

Indeed, the federal and state courts are united on the question. (*Booker v. Jabe,* 775 F.2d 762, 772 (6th Cir. 1985), vacated and remanded for reconsideration, ____ U.S. ____, 92 L.Ed.2d 705, 106 S.Ct. 3289 (1986), reinstated on remand, 801 F.2d 871 (1986); *People v. Wheeler, supra,* 22 Cal.3d at 282, fn. 29, 148 Cal.Rptr. at 906-907, 583 P.2d 748; *State v. Neil,* 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, 517, n. 35 (1979); *Commonwealth v. Reid,* 384 Mass. 247, 424 N.E.2d 495, 498-501 (1981); *Commonwealth v. DiMatteo,* 12 Mass.App. 547, 427 N.E.2d 754, 757-758 (1981).) Moreover, at least three other state jurisdictions, while not specifically deciding the issue, have suggested that the defense is also subject to restrictions on challenges based on race. (*Riley v. State,* 496 A.2d 997, 1011 (Del.Supr. 1985), cert. den. *sub nom. Riley v. Delaware,* ____ U.S. ____, 92 L.Ed.2d 743, 106 S.Ct. 3339 (1986) [referring to "a *party*'s exercise of peremptory challenges"], *State v. Gilmore,* 103 N.J. 508, 511 A.2d 1150, 1163, n. 6 (1986) [realizing a distinction between defense challenges of minority and majority racial groups]; *People v. Thompson,* 79 App.Div.2d 87, 435 N.Y.S.2d 739, 752 (1981) [speaking of the availability of the peremptory to "a *party*"].)

The opinions and dicta of the state and federal courts are consistent. In addition, they are for the most part

founded on the principle that the government as well as the defendant in a criminal case is entitled to a fair trial. (See, *e.g., Commonwealth v. Soares, supra*, 377 Mass. 461, 387 N.E.2d 499.) As respondent demonstrates in its remaining argument, that basis, in addition to others, justifies the restriction placed on petitioner's peremptory challenges in this case. Therefore, there appears no need for this Court to review the decision of the Appellate Department, since it is "in line" with the carefully considered case law which has developed nationwide on the issue. (Cf. Rule 17.1(b), United States Supreme Court Rules.)

D. The State Trial Court Restriction Upon the Exercise of Petitioner's Peremptory Challenges Was Not Violative of the Sixth or Fourteenth Amendments

Petitioner asserts a "time-honored" right to unallayed peremptory challenges and contends that his Sixth Amendment right to an impartial jury trial and the equal protection of the laws as guaranteed by the Fourteenth Amendment were violated by virtue of the restraints placed upon his peremptory challenges. (Petition 4, 16.) Petitioner's argument that the Sixth and Fourteenth Amendments ensure him unfettered peremptory challenges is without basis. The right to exercise such challenges is not constitutionally mandated; rather, it is state-created. The limitation on the challenges allowed by the state trial and appellate courts did not violate his rights to jury trial, due process or equal protection. Respecting the equal protection argument, petitioner was simply not denied any right extended to persons similarly situated. The state's restriction on petitioner's challenges did not violate due process or the Sixth Amendment because it did not affect the function of the jury as an impartial trier of fact; moreover, there exist compelling justifications for the limitation.

1. States Need Not Allow Defense Peremptory Challenges. Once a State Permits Such Challenges, It May Restrict Them in Any Reasonable Manner

"The right of peremptory challenge is . . . a right to reject jurors." (*United States v. Marchant*, 25 U.S. 480, 482, 6 L.Ed. 700 (1827).) There can be no doubt in this case that the state trial court restricted petitioner's right to reject three black jurors and therefore limited the exercise of his peremptory challenge. Nevertheless, that limitation did not result in any incursion upon his constitutional rights.

The procedural details of the jury system are for the states to control and develop. This Court has established that

> " 'there is nothing in the Constitution of the United States which requires the Congress or the States grant peremptory challenges[.]' " (*Swain v. Alabama*, 380 U.S. 202, 219, 13 L.Ed.2d 759, 772, 85 S.Ct. 824 (1965); see also *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 84, 106 S.Ct. 1712.)

As stated in *United States v. Wood*, 299 U.S. 123, at 145-146, 81 L.Ed. 78, at 88, 57 S.Ct. 177 (1936) (citing *Stilson v. United States*, 250 U.S. 583, 586, 63 L.Ed. 1154, 1156, 40 S.Ct. 28 (1919)),

> " '[T]rial by an impartial jury is all that is secured.'
>
> * * *
>
> ". . . [T]he mode of procuring and impanelling such jury is regulated by law, either common or statutory. . . ."

(See also, *Swain v. Alabama, supra,* 380 U.S. at 244, 13 L.Ed.2d at 786, 85 S.Ct. 824 (Goldberg, J., dissenting).)

Petitioner contends that his Sixth Amendment guarantee of an impartial jury trial was violated by the trial court's actions. To the contrary, the Sixth Amendment does not dictate to the states precise procedures to follow to warrant against abridgement of this right. Furthermore, the practice petitioner advocates would frustrate, not encourage, the formation of impartial juries.

It is essential to investigate *Williams v. Florida*, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970), in this regard. In *Williams*, this Court decided that the Sixth Amendment right to jury trial did not require a state to present criminal defendants with a trial by exactly 12 persons. The Court upheld a Florida law which provided for a six-man jury in all but capital cases.

> "Legislatures may well have their own views about the relative value of the larger and smaller juries .... Our holding does no more than leave these considerations to the Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." (*Williams v. Florida, supra,* 399 U.S. at 103, 26 L.Ed.2d at 462, 90 S.Ct. 1893.)

Thus, the Court responded to Florida's limitation on the numbers in a petit jury panel by allowing the restriction, despite the tradition of the 12-man jury. To determine whether the Sixth Amendment commands a particular procedure, this Court stated,

> "[t]he relevant inquiry ... must be the function that the particular feature performs and its relation to the purposes of the jury trial." (*Id.,* 399 U.S. at 99-100, 26 L.Ed.2d at 460, 90 S.Ct. 1893.)

Viewed in this light, petitioner's interpretation of the scope of the Sixth Amendment is clearly flawed.

> "[T]he essential feature of a jury trial obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Id.*, 399 U.S. at 100, 26 L.Ed.2d at 460, 90 S.Ct. 1893.)

Absolute freedom to discharge blacks from a petit jury simply because they are black would not serve this purpose. Instead, it would negate community participation and work strongly against providing a common sense judgment in jury verdicts by the promotion of group bias. (See *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 81-82, 106 S.Ct. 1712.) Unrestricted defense peremptory challenges would perform a function that would hinder, not help, the realization of a fair and proper jury trial. Clearly no Sixth Amendment violation appears from the limitation imposed by the state courts.

Petitioner's assertion that he was denied equal protection of the laws is also without merit. State action under the Fourteenth Amendment

> "is not open to the objection that it denies . . . equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." (*Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205, 209, 32 L.Ed. 107, 109, 8 S.Ct. 1161 (1888).)

(See also *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 84, 90 L.Ed. 1096, 1098-1099, 66 S.Ct. 850 (1945); *Prince v. Massachusetts*, 321 U.S. 158, 170-171, 88 L.Ed. 645, 655, 64 S.Ct. 438 (1943).) Here petitioner has not shown that the California restriction on his peremptory challenges resulted in treatment of him which was different from that received by any other criminal defendant. Thus, he

has failed completely to establish a claim of denial of equal protection of the laws.

Likewise, the restraints placed upon petitioner's peremptory challenges did not deny him due process.[2] In the companion cases of *Johnson v. Louisiana, supra*, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620, and *Apodaca v. Oregon, supra,* 406 U.S. 404, 32 L.Ed.2d 184, 92 S.Ct. 1628, this Court held constitutional state laws which allowed criminal convictions based upon verdicts of guilty by non-unanimous juries. Again, the decisions stressed the state's control of criminal procedure.

In *Johnson* the appellant was charged with robbery, an offense necessarily punished by hard labor. Louisiana law required the guilty votes of nine of twelve jurors to convict a defendant of such a crime. The state demanded unanimity only in trials of capital crimes attended by 12-man juries and in trials by five-man juries for crimes where the penalty of hard labor was merely permissive. The appellant complained that because he had been convicted by a verdict of nine to three, he had been denied due process and equal protection of the laws. This Court

---

[2]Petitioner does not specifically raise the argument that the constraints upon his peremptory challenges violated the Fourteenth Amendment's Due Process Clause. However, respondent has chosen to discuss the application of the tenets of due process for two reasons: first, a due process analysis has been utilized in cases decided by this Court involving the states' extension or denial of privileges in criminal proceedings. *Ross v. Moffitt*, 417 U.S. 600, 608-612, 41 L.Ed.2d 341, 350-351, 94 S.Ct. 2437 (1974); *Marshall v. United States,* 414 U.S. 417, 428-430, 38 L.Ed.2d 618, 627-628, 94 S.Ct. 700 (1974); *Apodaca v. Oregon*, 406 U.S. 404, 32 L.Ed.2d 184, 92 S.Ct. 1628 (1972); *Douglas v. California,* 372 U.S. 353, 357, 9 L.Ed.2d 811, 814, 83 S.Ct. 811, 814, 83 S.Ct. 814 (1963).) Second, a due process discussion thoroughly exposes petitioner's contentions as inconsistent with the proper role of the jury in this pluralistic society.

rejected his claims. With regard to the due process issue, the Court declared:

> "[I]t is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." (*Id.*, 406 U.S. at 360, 32 L.Ed.2d at 158, 92 S.Ct. 1620.)

In *Apodaca v. Oregon, supra*, Justice White further explained the due process holding:

> "A requirement of unanimity, however, does not materially contribute to the exercise of ... common sense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt." (*Id.*, 406 U.S. at 410-411, 32 L.Ed.2d at 191, 92 S.Ct. 1628.)

The use of the peremptory challenge advocated by petitioner, which would allow control of the racial makeup of a jury to pass into a defendant's hands, does not contribute at all to the function of the jury as described in *Apodaca v. Oregon, supra.* Peremptories based upon race would surely jeopardize cross-sectional representation in juries. Indeed, since "[n]o group ... has the right to block convictions" (*Id.*, 406 U.S. at 413, 32 L.Ed.2d at 193, 92 S.Ct. 1628), uncontrolled use of peremptory challenges would clearly work against the fulfillment of the jury's designated role.

The classifications created by the states in *Johnson* and *Apodaca* served merely "to 'facilitate, expedite, and reduce expense in the administration of justice.' " (*Johnson v. Louisiana, supra,* 406 U.S. at 364, 32 L.Ed.2d at 160, 92

S.Ct. 1620.) In this case, the denial of petitioner's challenges, as respondent demonstrates, *infra*, is based on far more fundamental and honored grounds, namely the preservation of the state's right to a fair trial and the guarantee of access to the criminal justice system to persons of all races. Given this necessary basis for the restriction on petitioner's statutory rights, he can hardly complain of a denial of due process.

Just as in the cases above, the State of California in this case asserted control of its jury selection process in a proper manner. The California Supreme Court in *People v. Wheeler, supra,* and the Appellate Department in this case grounded their holdings upon California statutory and constitutional provisions. The state thus assumed the authority over the type of peremptory challenges exercised by petitioner. That control, under the standards set forth in this Court's cases cited above, did not infringe upon any provision of the United States Constitution.

State of California Penal Code section 1069 provides:

> "A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the Court must exclude him." (West's Ann. Cal. Penal Code § 1069.)

Penal Code section 1070, subdivision (a), allows the defendant and the state each 10 peremptory challenges in trials of offenses other than those punishable with death or life imprisonment. (*Id.,* § 1070.)

In *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, the California Supreme Court construed section 1069:

> "It is true that the statute defines such a challenge as one for which 'no reason need be given'; *but it does not follow therefrom that it is an objection for which no*

> *reason need exist.*" (*Id.*, 22 Cal.3d at 274, 148 Cal.Rptr. at 901, 583 P.2d 748, partial emphasis in the opinion.)

From that construction, the court proceeded to determine that Article 1, section 16, of the California Constitution,[3] which implicitly guaranteed a trial by an impartial jury, was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (22 Cal.3d at 265, 276-277, 148 Cal.Rptr. at 895, 903, 538 P.2d 748.) The *Wheeler* court stated clearly the scope of its decision in footnote 29, 22 Cal.3d at 282, 148 Cal.Rptr. at 906-907, 538 P.2d 748:

> "[T]he Attorney General has [the] right [to object to same misuse of peremptory challenges on the part of defense counsel] *under the constitutional theory we adopt herein*: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism. . . . For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the basis of group bias alone." (Emphasis added.)

The Appellate Department's Opinion in this case adopted the above statement in *Wheeler* as the rationale for its decision. (Petition A-8, 186 Cal.App.3d at Supp. 7, 232

---

[3]Article 1, section 16, provides in relevant part:

> "Trial by jury is an inviolate right and shall be secured to all. . . ."

Cal.Rptr. at 107-108.) Thus, the restriction upon defense peremptory challenges in the *Wheeler* and *Pagel* cases is firmly set in the statutory, constitutional and common law of the State of California.

As demonstrated above, the restriction is manifestly not violative of the federal Constitution. Moreover, this Court's decisions and the opinions of individual justices through *Batson v. Kentucky* express the rationales for the restriction applied to peremptory challenges in this case. Indeed, *People v. Wheeler* examined this Court's opinions to explain the policy behind its interpretation of the California statutes and constitution. (22 Cal.3d at 267-270, 148 Cal.Rptr. at 896-898, 583 P.2d 748.) When viewed in the light of the applicable principles evoked by this Court, which respondent discusses below, clearly the restriction of the race-based excusal of jurors by the defense in this case was a proper activity of the state courts.

2. Petitioner Had No Constitutional Right to a Petit Jury Panel From Which Blacks Were Excluded

The restriction imposed upon petitioner's selection of jurors in this case was proper, because he had no constitutionally justified expectation of a jury from which blacks were excluded. Given the total lack of even a colorable argument to the contrary, no review of the Appellate Department's holding should be granted. As this Court stated in *Batson v. Kentucky:*

> "[A] defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' [Citation]" (*Id.*, 476 U.S. at ____, 90 L.Ed.2d at 80, 106 S.Ct. 1712).

Furthermore, as the opinion in *Williams v. Florida, supra,* observed,

> "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden [citation], the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one." (*Id.*, 399 U.S. at 102, 26 L.Ed.2d at 461, 90 S.Ct. 1893.)

(See also *Apodaca v. Oregon, supra,* 406 U.S. at 412-413, 32 L.Ed.2d at 192-193, 92 S.Ct. 1628.) Although *Batson* has expanded the exception stated in *Williams, supra,* to include "arbitrary exclusions" from a petit jury, the lesson from these cases remains intact. A criminal defendant can neither expect nor demand a jury composed of persons who will favor him on racial grounds. He only has a right to "a jury whose members are selected pursuant to nondiscriminatory ~~criteria~~." (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 80, 106 S.Ct. 1712.) Petitioner, however, does not claim to have been deprived of that right. What petitioner claims is the "time-honored right to unfettered peremptory challenges." (Petition 16.)

Petitioner's argument really amounts to a contention that whenever a defendant has the opportunity to obtain a biased jury by eliminating jurors because of their race alone, he may constitutionally avail himself of that opportunity. the Constitution, however, does not afford such a right to petitioner, as the above-cited cases demonstrate. A defendant in a criminal trial has only the right to be tried by an impartial jury from which racial groups have *not* been excluded without cause. Since petitioner makes no argument that such a trial did not occur, the Petition should not be granted.

3. The State of California Was Entitled to a Fair Trial before Impartial Jurors

A further reason exists why the Petition in this case should not be granted. In view of the state's interest in a fair trial, no unwarranted restriction upon petitioner's peremptory challenges took place. In matters relating to selection of a jury, the government has an equal stake with the defendant in the impanelment of an impartial jury. The principle was established as early as *Hayes v. Missouri, supra*:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." (*Id.*, 120 U.S. at 70, 38 L.Ed. at 579-580, 7 S.Ct. 350.)

(See also *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 94-95, 106 S.Ct. 1712, (Marshall, J., concurring [citing *Hayes* and stating that since "[t]he potential for racial prejudice . . . inheres in the defendant's challenge as well . . . only by banning peremptories entirely can such discrimination be ended."]; 476 U.S. at ____, 90 L.Ed.2d at 107, 106 S.Ct. 1712 (Burger, C.J., dissenting).

> "The function of the [peremptory] challenge is not only to eliminate extremes of partiality *on both sides,* but to assure *the parties* that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." (*Swain v. Alabama, supra,* 380 U.S. at 219, 13 L.Ed.2d at 759, 85 S.Ct. 824, emphasis added.)

In an analogous situation, this Court held in *Singer v. United States,* 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783 (1965), that the Federal Rules of Criminal Procedure could constitutionally require the consent of the prosecu-

tion and the court to a defendant's waiver of a trial by jury.

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." (*Id.*, 380 U.S. at 36, 13 L.Ed.2d at 638, 85 S.Ct. 783.)

Allowing absolute freedom for the defense in the jury selection process, as desired by petitioner, would undermine the state's interest in a fair trial acknowledged by the authority cited above. When a defense attorney avails himself of a jury composed of persons of the defendant's own race, the state cannot be assured of a panel from which the extremes of partiality have been eliminated. When a defendant effectively seeks jurors prejudiced against his prosecution by excusing blacks solely on the basis of their race, the process no longer serves its purpose to locate impartial jurors.

> "The spectacle of a defense counsel systematically excusing potential jurrors because of their race . . . while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury." (*Booker v. Jabe, supra,* 775 F.2d at 772.)

Because the limitation by the California courts upon petitioner's peremptory challenges furthers this state interest, it is an eminently justifiable restriction. The ruling of the Appellate Department of the Los Angeles Superior Court should be allowed to stand.

4. All Citizens, Regardless of Race, Must Be Allowed to Participate in Jury Deliberations in Criminal Cases

Additionally, the state appellate court's decision in this case should not be subject to a writ of certiorari, because the ruling of the Superior Court was correct in determining that unabated peremptory challenges by defense counsel in criminal cases would stifle the participation in the jury system of all racial groups in our society. In the statement which the Appellate Department cited (Petition A-7, 186 Cal.App.3d at Supp. 6, n. 1, 232 Cal.Rptr. at 107), Justice Powell wrote in *Batson:*

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. [Citation.] Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.' " (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 81-82, 106 S.Ct. 1712, citing *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664, 666 (1880).)

Other pronouncements of this Court are no less forceful.

> "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community, and not the organ of any special group or class." (*Glasser v. United States,* 315 U.S. 60, 86, 86 L.Ed. 680, 707, 62 S.Ct. 457 (1942).)
>
> "When any large and identifiable segment of the community is excluded from jury service, the effect is

> to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (*Peters v. Kiff,* 407 U.S. 493, 503-504, 33 L.Ed.2d 83, 94, 92 S.Ct. 2163 (1972), fn. omitted.)

(See also *Vasquez v. Hillery,* 474 U.S. ____, 88 L.Ed.2d 598, 607-608, 106 S.Ct. 617 (1986); *Taylor v. Louisiana,* 419 U.S. 522, 530, 42 L.Ed.2d 690, 698, 95 S.Ct. 692 (1975); *Ballard v. United States,* 329 U.S. 187, 193-194, 195, 91 L.Ed. 181, 186-187, 67 S.Ct. 261 (1946); *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220, 90 L.Ed. 1181, 1185, 66 S.Ct. 984 (1946).)

Petitioner dismisses these vastly important ideals of our system of justice as "general societal goals" of "very limited benefit." (Petition 16.) In contrast stands Justice O'Connor's statement concurring in the denial of certiorari in *Brown v. North Carolina,* 479 U.S. ____, 93 L.Ed.2d 373, 374, 107 S.Ct. 423 (1986):

> "*Batson,* in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. It is central to *Batson* that a 'person's race simply "is unrelated to his fitness as a juror" ' *Id.,* at ____, 90 L.Ed.2d 69, 106 S.Ct. 1712 (citation omitted)."[4]

---

[4]The dissenting opinion in *Swain v. Alabama, supra,* deplored the use of the judicial system to perpetuate racial discrimination. According to Justice Goldberg, the record established "[t]he State's agreement with the defense . . . to remove Negroes from jury

The restriction in this case upon petitioner's peremptory challenges furthers the commitment against racial distinctions expressed by this Court and therefore is constitutionally justified. Based on the solid underpinning of the restriction, there is no need to reexamine the decision of the Appellate Department in this case.

CONCLUSION

Petitioner has unabashedly asked this Court to allow removal of jurors on the basis of race. However, the Appellate Department's Opinion stands firmly upon California law which withstands constitutional scrutiny and upon principles which this Court has vigorously maintained. The holding is consistent with that of other appellate courts. Certiorari should not be granted in this case.

Respectfully submitted,

JAMES K. HAHN,
City Attorney of Los Angeles
WILLIAM N. STERLING,
Deputy City Attorney
LAURENCE WAYNE MOONEY
Deputy City Attorney
and
Counsel of Record

Attorneys for Respondent
State of California

---

venires." (*Id.*, 380 U.S. at 234-235, and n. 2, 13 L.Ed.2d at 781, 85 S.Ct. 824.) This joint participation by state officials constituted state action under the Fourteenth Amendment (*Ibid.*) If the prosecutor and the trial judge in this case had permitted petitioner's defense counsel to blatantly remove jurors solely because of their race, the State of California would have been as deeply involved in discrimination. (*Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948).)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 31, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "Herbert Pagel vs State of California" in the United States Supreme Court, October Term 1986, No. 86-1085;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
#1 First Street N.E.
Washington, D.C. 20543
(Original and forty copies)

Edward J. Horowitz,
Attorney at Law
11661 San Vicente Blvd.,
Suite 1015
Los Angeles, CA 90049

Clerk, Appellate Dept. of the
Superior Court
Department 70
111 North Hill Street
Los Angeles, CA 90012 (1)

Honorable Larry Fidler
Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012 (1)

Honorable Michael E. Pastor
Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012 (1)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 31, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA